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Nos. 87-1622, 87-1697, and 87-1711

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

PHILIP BRENDALE,
Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, et al.,
Respondents.

STANLEY WILKINSON,
Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

COUNTY OF YAKIMA, et al.,
Petitioners,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF OF THE COLORADO RIVER INDIAN TRIBES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE

The Colorado River Indian Tribes ("CRIT") is an Indian tribe organized in accordance with Section 16 of the Indian Reorganization Act of June 18, 1934, 25 U.S.C. section 476 ("IRA"). The Colorado River Indian Reservation comprises approximately 275,000 acres of land in both California and Arizona spanning the Colorado River north of Blythe, California. The Reservation was established by Congress on March 3, 1865 (13 Stat. 559). The boundaries of the Reservation were expanded and further delineated by Executive Orders of November 22, 1873, November 16, 1874, May 15, 1876, and November 22, 1915. The Reservation was established to provide a permanent homeland for the Indian tribes of the Colorado River, and it encompasses a portion of the traditional homeland of the Mohave tribe.

The townsite of Parker lies on the Arizona side of the Colorado River within the exterior boundaries of the Reservation. Whether Parker is part of the Reservation, as CRIT and the United States contend, or is instead an island of non-reservation land surrounded by the Reservation, as Parker claims, is disputed in litigation currently pending in United States District Court for the District of Arizona. *Colorado River Indian Tribes v. Town of Parker*, No. CIV 83-2359-PHX-RGS.[1]

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[1] The Town of Parker has filed an amicus curiae brief in support of petitioners in this case. In its brief, Parker does not adhere to proper rules of practice by simply describing its interest in the case and then presenting legal argument relating to the case before the Court. Rather, Parker presents to this Court an extensive summary of the legal arguments it has presented to the United States District Court in *CRIT v. Parker*, terming these arguments a "summary of facts." Parker then proceeds to argue to this Court that fee lands within Parker should not be subject to tribal authority.

Parker's argument is improper on several counts. First, the issues addressed by Parker are pending before the United States District Court in Phoenix, not before this Court. Second, the arguments labeled "facts" by Parker are not undisputed facts supported by evidence. Rather, they are inaccurate representations of fact mixed in with legal argument. The evidence in the record before the District Court paints a factual picture far different from that presented by Parker in its amicus brief. This

Approximately two-thirds of the lots in Parker are fee patented lots owned by non-Indians and Indians. The remaining one-third of the lots were never patented and are either owned by the United States in trust for CRIT, as the United States and CRIT contend, or by the United States, as Parker contends. Elsewhere on the Reservation, the vast majority of land is owned by the United States in trust for CRIT. Less than 10,000 acres of the Reservation was allotted to individuals pursuant to the Allotment Acts of April 21, 1904 (33 Stat. 224), and March 3, 1911 (30 Stat. 1058, 1063).

According to the U.S. Census, as of 1980 there were 7,873 persons living on the Reservation, of whom 1,965 (25%) were American Indians. Within the town of Parker, in 1980 there were 2,542 persons, 282 of whom (11%) were American Indians. There are approximately 2980 enrolled members of CRIT.

CRIT has exercised land use regulatory authority throughout the Reservation, including in the town of Parker. CRIT has adopted a number of land use ordinances which regulate such matters as development permits, off-road vehicles and preservation of cultural resources. In September 1988, CRIT adopted a comprehensive general plan for a 20,000 acre portion of the Reservation known as "the Western Boundary," which comprises the majority of the California side of the Reservation. CRIT intends to adopt additional area plans for other portions of the Reservation as well. CRIT is also in the process of developing a Reservation-wide zoning code.

Within the town of Parker, both CRIT and Parker assert land use regulatory authority. The fact that Parker has required tribal compliance with its building and zoning laws on both fee lots and non-fee lots in Parker has underscored conflicts with CRIT

Court should not assume to be true any of the factual assertions made by Parker in section II of its brief.

Despite CRIT's intense desire to set the record straight before this Court, it will refrain from repeating the errors made by Parker and will not embark on any argument of the merits of *CRIT v. Parker*. The only facts from that case presented herein are those that are necessary for CRIT to describe its interest in the case before this Court.

regulations and has caused serious problems for CRIT and its members.

Insofar as the Court's decision in this case could affect which jurisdiction—CRIT, the town of Parker, or the counties of La Paz, Arizona or San Bernardino or Riverside, California—has land use regulatory authority over fee lands and trust lands within the Colorado River Indian Reservation, CRIT has a very strong interest in the outcome of this case.

SUMMARY OF ARGUMENT

This brief presents two parallel, complementary arguments. One is largely legal; the other largely factual. CRIT's legal argument places the holding in *Montana v. United States*, 450 U.S. 544 (1981) and its language concerning tribal sovereign authority over non-Indians on fee lands into the context of over 150 years of treaties, statutes, and case law. CRIT shows that *Montana* cannot be construed to impose the narrow limits on tribal civil regulatory authority urged by petitioners. If so construed, *Montana* conflicts in fundamental ways with prior law. Instead, *Montana* must be understood as an affirmation of inherent tribal authority "necessary to protect tribal self-government [and] to control internal relations." 450 U.S. at 564.

To give that affirmation full force, and to avoid an abrupt departure from prior case law, the Court must endow the *Montana* language regarding tribal authority over non-Indians on fee lands with vigor and meaning. The inevitable conclusion is that in this case, as will be true in most cases, the tribe will be found to have retained the exclusive power to zone fee lands within the reservation.

The factual argument presented in this case demonstrates that allowing counties and cities to zone fee lands within Indian reservations (and concomitantly stripping tribal governments of that authority) prevents tribal governments from regulating conduct which "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. This argument is rooted in the fact that the power to zone within "Indian country" is an essential aspect

of the right of tribal self-government. It is undisputed that Indian tribes have the power to zone trust lands. That power cannot possibly be effective if the tribe cannot also regulate adjacent or interspersed fee lands within the reservation. Thus, in virtually all instances, eliminating tribal zoning authority over such lands would effectively deprive the tribe of the ability to protect the health, safety, and welfare of its members and of all those people residing on the reservation.

ARGUMENT

I

IN DETERMINING WHICH ENTITY HAS LAND USE REGULATORY AUTHORITY OVER FEE LANDS ON RESERVATIONS, THE COURT LOOKS AT THE SCOPE OF INHERENT TRIBAL SOVEREIGN POWERS, AT RELEVANT TREATIES, AND AT ALL RELEVANT SUBSEQUENT LAWS WHICH MAY EITHER PREEMPT OR CONFER STATE OR TRIBAL AUTHORITY

Most of the briefs in support of petitioners focus exclusively on the narrow issue whether, under *Montana v. United States*, 450 U.S. 544 (1981), the Yakima Nation has the authority to zone fee lands within the reservation. While this issue is indeed presented to the Court in this case, it is only part of the larger question before this Court. That central question is which entity has zoning and land use regulatory authority over fee lands within an Indian reservation—the tribe or the city or county within which the fee lands lie? In reviewing this case, the Court must therefore look not only at the case law defining the extent to which an Indian tribe may regulate non-Indians and fee land on the reservation; it must also carefully consider the authorities describing the permissible reach of state regulatory jurisdiction on Indian reservations.[2]

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[2] As CRIT's own experience confirms, concurrent zoning or other land use regulatory authority over fee lands is infeasible. To the extent that the regulations imposed by the County and the tribe conflict, a logjam would be created, and neither entity could effectively regulate

The scope of tribal authority over fee lands within Indian reservations is defined by two parameters: inherent tribal sovereign powers and powers conferred or withdrawn by treaties and other federal laws. Summarizing the nature of tribal sovereign powers in *United States v. Wheeler*, 435 U.S. 313, 323 (1978), this Court stated:

> Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

Tribal sovereign powers are also commonly referred to as "the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 151 (1980); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168-173 (1973).

The Court has emphasized that there is a "significant geographical component to tribal sovereignty . . . 'The cases in this Court have consistently guarded the authority of Indian governments over their reservations.' " *White Mountain Apache*, 448 U.S. at 151 (quoting *Williams v. Lee*, 358 U.S. at 223). Recently, in *Iowa Mutual Ins. Co. v. LaPlante*, 107 S.Ct. 971 (1987), the Court took pains to point out that the attributes of sovereignty retained by tribes extend throughout their territory to non-Indians as well as Indians on the reservation. The Court stated, "Indian tribes retain 'attributes of sovereignty over both their members and their territory.' " 107 S.Ct. at 975, quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975). In other words,

> Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact.

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land use. *See* Section IV below. *See* also *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 339 (1983) (concurrent state and tribal jurisdiction "would effectively nullify the Tribe's authority to control hunting and fishing on the reservation" and "could severely hinder the ability of the Tribe to conduct a sound management program"); *Segundo v. City Rancho Mirage*, 518 F.2d 1387, 1393 (9th Cir. 1987).

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149, n.14 (1982) (upholding tribe's authority to impose a severance tax on oil and gas production by non-Indians on reservation land).

The Court also discussed the nature of tribal sovereign powers in *Montana v. United States*, 450 U.S. 544 (1981). In *Montana*, the Court reaffirmed that the inherent sovereign powers retained by Indian tribes are those "necessary to protect tribal self-government [and] to control internal relations." 450 U.S. at 564. In the context of regulation of non-Indians on fee lands in the reservation, tribal sovereign powers include the power to regulate non-Indian conduct "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," or where a non-Indian has entered a consensual relationship with the tribe or its members. 450 U.S. at 566.

To determine whether tribal powers have been conferred or withdrawn by treaties or other federal laws, courts must scrutinize the applicable treaties and laws in each case. Ambiguities in those laws are to be resolved in favor of Indians "in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 144. *See McClanahan v. Arizona State Tax Comm'n*, 411 U.S. at 174-75. As stated in *Felix S. Cohen's Handbook of Federal Indian Law* (1982) (hereinafter "*Federal Indian Law*"), at 221, 224-25:

> Since congress is exercising a trust responsibility when dealing with Indians, courts presume that Congress' intent toward them is benevolent and have developed canons of construction that treaties and other federal action should when possible be read as protecting Indian rights and in a manner favorable to Indians.
>
> * * *
>
> [The canons] provide for a broad [statutory] construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when Indian rights are to be abrogated or limited.

The scope of state or local civil regulatory jurisdiction on an Indian reservation is also determined by reference to inherent tribal sovereign powers and federal law. There are two independent but related barriers to assertion of state regulatory authority over Indian country and tribal members. First, such exercise of authority may be preempted by federal law. *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 142; *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). As the Court has repeatedly emphasized, the preemption analysis used in determining jurisdiction over Indian reservations is strikingly different from that used in other areas of the law:

> Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other. The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been preempted by operation of federal law.

White Mountain Apache, 448 U.S. at 143 (citing *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 475 (1976)).

The Court has found that the federal purposes of Indian treaties and statutes are broadly preemptive of state law, and in many circumstances has found state laws preempted based not on specific preemptive language but rather on implications from general purposes of federal treaties and statutes. *See, e.g., Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. at 838; *Fisher v. District Court*, 424 U.S. 382 (1976).

As a general matter, state laws may be enforced against non-Indians in Indian country only "up to the point where tribal self-government would be affected." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. at 179. The Court has held state authority over non-Indians acting on reservations to be preempted in a number of cases even though Congress had made no express statement on the subject. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982); *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980); *Kennerly v.*

District Court of Montana, 400 U.S. 423 (1971); *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965); *Williams v. Lee*, 358 U.S. 217 (1959).

Second, exercise of state authority within Indian country may be an unlawful infringement on tribal sovereign authority. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. at 142, 151; *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. at 168-173; *Williams v. Lee*, 358 U.S. at 220. In general, the Court has emphasized that within the boundaries of "Indian country," as the term is defined in 18 U.S.C. section 1151, states have strictly limited civil regulatory authority. As the Court stated in *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973), quoting from *United States v. Kagama*, 118 U.S. 375, 381-82 (1886), Indian tribes have retained

> "a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided."

In sum, whether the Court focuses on the permissible extent of state authority on the reservation or the scope of tribal authority over fee lands, and whether the Court couches its analysis under the rubric of "preemption" or that of "inherent tribal sovereign powers," the factors to be analyzed remain the same. The Court must determine whether the Yakima Nation, by virtue of treaty or inherent powers, originally had the power to zone all lands in the reservation, including the lands in question in this case. Then the Court must review pertinent subsequent Congressional actions to determine the extent to which state authority is preempted, or conversely, tribal authority has been diminished.

II

AT THE TIME THE YAKIMA RESERVATION WAS CREATED, THE TRIBE POSSESSED CIVIL REGULATORY POWER THROUGHOUT ITS RESERVATION OVER BOTH INDIANS AND NON-INDIANS

In the treaty between the tribes of the Yakima Indian Nation and the United States which was signed in 1855 and ratified in 1869, 12 Stat. 951, the tribes ceded vast areas of land, at the same time reserving an area for their "exclusive use and benefit." The treaty provided that no white man could reside on the reservation without permission of the tribe. *Id.* Petitioners do not dispute that this treaty conferred upon the Yakima tribe full authority to govern use of the lands in the reservation and to control use of those lands by both tribal members and non-Indians. Rather, petitioners and their amici argue only that any authority which the tribe had over non-Indians was subsequently removed by acts of Congress and, most particularly, the Allotment Act of 1887.

That tribal sovereign power at the time the Yakima Reservation was created extended to the actions and use of land by non-Indians on the reservation is also clear. In the seminal case of *Worcester v. Georgia*, 6 Pet. (31 U.S.) 515 (1832), holding that the State of Georgia could not exercise jurisdiction over a non-Indian on the Cherokee Reservation, Chief Justice Marshall noted that Indian tribes retained broad inherent powers over their territories:

> The Indian nations had always been considered as distinct, independent political communities retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power.

As of the 1850's and 60's, tribal sovereign powers as described by Chief Justice Marshall remained intact, as neither congressional action nor judicial interpretation had placed any limits upon the holding in *Worcester v. Georgia*.

Thus, the Court must determine whether any subsequent action of Congress stripped the Yakima tribe of its authority to

zone some of its lands. At the same time, relevant subsequent congressional acts must be scrutinized to determine whether they preempt, either expressly or by implication, state authority over fee lands on the reservation.

III

FEDERAL ACTIONS SINCE THE CREATION OF THE YAKIMA RESERVATION CONFIRM TRIBAL AUTHORITY TO ZONE FEE LANDS ON THE RESERVATION AND PREEMPT ANY COUNTY AUTHORITY TO ZONE SUCH LANDS

A. The General Allotment Act of 1887

Petitioners' arguments in support of County zoning authority over fee lands on the reservation rest largely on the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. section 331 et seq. Indeed, petitioner Wilkinson acknowledges that in the absence of this Act, "that former treaty right [to exclude non-members from their reservation] might now serve as authority for Tribal regulation of non-members' use of fee land." Wilkinson Brief at 33. When Congress authorized the allotment of plots of reservation land to individual Indians and the disposal of "surplus" lands to non-Indians, petitioners argue, Congress specifically intended that those non-Indian purchasers and their fee lands should not be subject to tribal regulation. Since Congress contemplated ultimate dissolution of Indian tribes and assimilation of Indians into non-reservation life, they argue, Congress could not have simultaneously intended that non-Indian land purchasers remain subject to tribal regulatory authority.

Similar arguments have been rejected time and again in the context of disestablishment cases that have come before this Court. *See, e.g., Solem v. Bartlett.* 465 U.S. 463 (1984); *Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent*, 368 U.S. 351 (1962). In each of those cases, it was argued that laws passed by Congress pursuant to its Allotment Act policy of allotting lands to individual Indians and selling surplus lands to non-Indians were intended to and did terminate the reservation status of the lands covered by the laws. The Court, however, has

been unwilling to assume from the overall understanding of that time that reservations would be terminated a specific desire of Congress to terminate reservation (or "Indian country") status of lands whenever they were opened up for sale to non-Indians. *Solem v. Bartlett*, 465 U.S. at 468-472.

With respect to the General Allotment Act, this Court has stated:

> The Act did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards.

Seymour v. Superintendent, 368 U.S. at 356. *See Mattz v. Arnett*, 412 U.S. at 496-7. The Court has emphasized that when Congress truly intended an act not only to make Indian lands available for sale to non-Indians but also to remove those Indian lands from the reservation (and from tribal jurisdiction), it used language that clearly and specifically indicated such an intent. *Mattz v. Arnett*, 412 U.S. at 504.

The Court's decision in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976) is most instructive on this point. There the state argued that it had taxing jurisdiction over Indians on fee lands within the reservation because that was the intent of the General Allotment Act. The Court rejected this argument, noting that the disestablishment cases had effectively disposed of the issue. 425 U.S. at 478. The Court stated:

> If the General Allotment Act itself establishes Montana's jurisdiction as to those Indians living on "fee patented" lands, then for *all* jurisdictional purposes—civil and criminal—the Flathead Reservation has been substantially diminished in size. A similar claim was made by the State in *Seymour v. Superintendent*, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962), to which we responded:
>
> > "[The] argument rests upon the fact that where the existence or nonexistence of an Indian reservation, and therefore the existence or nonexistence of federal juris-

> diction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal Government." *Id.*, at 358, 82 S.Ct., at 428, 7 L.Ed.2d, at 351.
>
> * * *
>
> Congress by its more modern legislation has evinced a clear intent to eschew any such "checkerboard" approach within an existing Indian reservation, and our cases have in turn followed Congress' lead in this area.

425 U.S. at 478-79. The holding in *Moe* is on point. Congress did not intend by the General Allotment Act to remove fee lands from tribal jurisdiction, whether the fee lands were ultimately held by Indians or non-Indians.

Petitioners propose to make the disestablishment issue a nullity by establishing a new rule whereby fee lands on Indian reservations are not subject to tribal regulatory authority. Presumably this is because under the congressional intent standard carefully enunciated by this Court, the fee lands at issue clearly have not been disestablished from the reservation. Thus, having lost the disestablishment battle, petitioners propose a new standard under which lands not disestablished from a reservation may be treated as if disestablished. Amicus CRIT contends to the contrary: the jurisdictional question surrounding fee lands created pursuant to allotment and surplus land acts is primarily a disestablishment question which revolves around whether Congress intended to remove those fee lands from the reservation.[3] The Court should not at this late stage create a brand new status for fee lands within Indian country which status entirely deprives Indian tribes of their regulatory authority over such lands.

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[3] Adhering to the Court's traditional view that the principal jurisdictional issue regarding fee lands is whether or not Congress intended that they be disestablished from the reservation would have the additional beneficial effect of reducing uncertainty and thereby reducing the need for litigation to resolve jurisdictional questions.

Other authorities also contradict petitioners' argument concerning the General Allotment Act. The case most directly on point is the 1905 case, *Buster v. Wright*, 135 Fed. 947. In this case, the Eighth Circuit held that neither the establishment of town sites within the Creek Nation territory nor the sale of lots therein to non-Indians deprived the Creek Nation of jurisdiction over those townsites or lots. The Court stated:

> the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it, or by the existence of municipalities therein endowed with power to collect taxes for city purposes, and to enact and enforce municipal ordinances. Neither the United States, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of its territorial jurisdiction by citizens or foreigners.

135 Fed. at 952.

This Court endorsed the same opinion in *Morris v. Hitchcock*, 194 U.S. 384, 392 (1904) (in upholding a tribal tax on livestock owned by non-Indians, Court approves concept of tribal taxation of hay grown on non-Indian fee lands in reservation). Two turn of the century Attorney General opinions follow the same reasoning. 23 Ops. Atty. Gen. 214 (1900); 23 Ops. Atty. Gen. 528 (1901). In considering the effect of an 1898 act providing for the organization of municipal corporations, the selection of town sites, and the appraisal and sale of town lots to non-Indians within the Creek Reservation, the Attorney General stated:

> if the Indian title to the particular lots sold had been extinguished, and conceding that the statute authorizes the purchase of such lots by any outsider, and recognizes his right to do so, the result is still the same, for the legal right to purchase land within an Indian nation gives to the purchaser no right of exemption from the laws of such nation, nor does it authorize him to do any act in violation of the treaties with such nation.

23 Ops. Atty. Gen. at 217.

B. The Indian Reorganization Act

By the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), Congress repudiated the policy of allotment and sale of Indian lands. 25 U.S.C. sections 461-475. The IRA stopped further alienation of Indian lands, authorized the Secretary of Interior to restore any remaining unsold surplus lands to tribal ownership, and reconfirmed the continued existence of tribal sovereign powers. *Id.* In addition to listing a number of specific powers retained by Indian tribes, the Act affirmed that tribes have "all powers vested in any tribe or tribal council by existing law." 25 U.S.C. section 476.

Insofar as petitioners argue that Congress intended by the General Allotment Act to terminate Indian reservations and tribal jurisdiction, the IRA represents a total reversal of that policy. The IRA was the first modern federal action enunciating the now well-established policy favoring tribal self-determination. While the IRA does not explicitly address the issue of tribal authority over fee lands within a reservation, by reaffirming tribal powers in Indian country and by ending allotment and sale of Indian lands it strongly supports such authority.

That the "existing powers" referred to in the IRA include authority over non-Indians and fee lands is demonstrated by 1934 Department of Interior Solicitor opinion discussing the nature of such "existing powers." 55 I.D. 14 (1934).[4] The Solicitor's opinion finds that "existing powers" include the powers "to regulate the use and disposition of all property within the jurisdiction of the tribe," and "to levy dues, fees, or taxes upon the members of the tribe and upon nonmembers residing or doing any business of any sort within the reservation." Opinions of the Solicitor, Department of the Interior, vol. 1 at 446.

Nothing in the Solicitor's Opinion indicates that tribal "existing powers" do not extend to fee lands within the reservation.

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[4] This opinion has been cited and relied upon by this Court. *See Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 153 (1980); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 174-85 (1982).

Nevertheless, as described in the following section, even if there was some confusion about tribal powers over fee lands as of 1934 because such lands were not considered "Indian country," in 1948 Congress eliminated this uncertainty and mandated tribal authority over such fee lands when it enacted a new definition of "Indian country."

C. The 1948 Enactment of a New Statutory Definition of "Indian Country," 18 U.S.C. Section 1151

A key statute that should guide the Court's review of this case is the federal definition of "Indian country," 18 U.S.C. section 1151, enacted in 1948. The term "Indian country" rather than "reservation" has historically been the determining term for jurisdictional purposes. *See Federal Indian Law* at 27-45. Prior to 1948, "Indian country" was not generally understood to include lands not owned by an Indian tribe. The first statutory definition of "Indian country," contained in the 1834 Indian Trade and Intercourse Act (4 Stat. 729) provided in pertinent part:

> [A]ll that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state [,] *to which the Indian title has not been extinguished*, for the purposes of this act, be taken and deemed to be the Indian country.

(Emphasis added.)

After this statute was omitted from the 1874 Revised Statutes (R.S. section 5596, effective June 22, 1874), the definition of "Indian country" was left to the courts. Decisions by this Court in following years held that "Indian country" included land "lawfully set apart as an Indian reservation," *Donnelly v. United States*, 228 U.S. 243 (1913), Pueblo Indian lands in New Mexico, *United States v. Sandoval*, 231 U.S. 28 (1913), and trust allotments, *United States v. Pelican*, 232 U.S. 442 (1914). The Court stated that the test was whether the land in question "had been validly set apart for the use of the Indians as such, under the superintendence of the Government." *United States v. Sandoval*,

231 U.S. at 449. *See also United States v. McGowan*, 302 U.S. 535 (1938).

Relying upon these decisions, in 1948 Congress codified the definition of "Indian country." *See* 18 U.S.C. section 1151 Historical and Revision Notes; *Federal Indian Law* at 34. Congress also provided that fee lands within Indian reservations were Indian country, thus changing the prior rule. Section 1151 provides in pertinent part:

> [T]he term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, *notwithstanding the issuance of any patent*, ...

(Emphasis added.)

This Court has held that the term "Indian country" as defined in section 1151 does not apply just to the criminal code sections in that chapter, but "generally applies as well to questions of civil jurisdiction," *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975), and also to questions of tribal jurisdiction. *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. at 477-79. *See Federal Indian Law* at 27 n.8, 28.

By defining "Indian country" to include fee lands within reservation boundaries, Congress enunciated its clear intention that fee lands and non-fee lands within the reservation be treated alike for jurisdictional purposes. Whereas prior to 1948 the status of fee lands within a reservation was in question, Congress in enacting section 1151 intended to put a definitive end to those questions by treating all land within the boundaries of an Indian reservation as "Indian country."[5]

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[5] In light of the widespread pre-1948 belief that fee lands could not be considered "Indian country," it is to be expected that pre-1948 statements on the issue might conclude that Indian tribes lacked jurisdiction over fee lands. What is surprising is the extent to which such actions and holdings reflect a persistent belief that Indian tribes *did* maintain jurisdiction over fee lands. *See, e.g., Morris v. Hitchcock*, 194 U.S. 382; *Buster v. Wright*, 135 Fed. 947; 55 I.D. 14; 23 Ops. Att'y Gen. 214; 23 Ops. Att'y Gen. 528.

Thus, even if tribal authority over fee lands on the reservation were not already clear from prior treaties and statutes as well as inherent tribal sovereign powers, it is certainly clear from the enactment of section 1151. That section evinces a congressional intent to preempt state authority over fee lands on reservations and to confirm tribal and federal authority over such lands.

D. Post-1948 Enactments and Policy Statements

Notwithstanding petitioner Brendale's arguments, this Court has repeatedly held that Pub. L. 280, 67 Stat. 588, as amended, 18 U.S.C. section 1162, 28 U.S.C. section 1360, did not confer upon states general civil regulatory jurisdiction over Indian reservations. *California v. Cabazon Band of Mission Indians*, 107 S.Ct. 1083, 1087-88 (1987); *Bryan v. Itasca County*, 426 U.S. 373 (1976). Nor did Pub. L. 280 strip tribes of any of their jurisdiction over their reservations. Thus, Pub. L. 280 is not relevant to this case.

Other more recent federal enactments are relevant, however, in demonstrating a consistent and pervasive federal policy encouraging tribal self-government, self-determination and economic independence. For example, the Indian Financing Act of 1974, 25 U.S.C. section 1451 et seq., states:

> It is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities.

Section 1451. Similar policies underlie the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. section 450 et seq. The Indian Civil Rights Act of 1968, 25 U.S.C. section 1301, et seq. also reflects the Congressional intent "to promote the well-established federal 'policy of furthering Indian self-government.' " *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1978), quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

In addition, both President Nixon and President Reagan issued policy statements strongly supporting Indian tribal self-government. 6 Weekly Comp of Pres. Doc. 894, 899-900 (1970) (Message of President Nixon); 19 Weekly Comp. Pres. Doc. (Jan. 24, 1983) (Message of President Reagan). Cf. Gross, Indian Self-Determination and Tribal Sovereignty: An Analysis of Recent Federal Policy, 56 *Texas L. Rev.* 1195 (1978). Numerous decisions of this Court have emphasized the importance of this overriding federal policy of recent decades. *See e.g., National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. at 856; *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 332; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 137, 138 n.5; *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 152; *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 143-44 n.10.

These recent actions by both the legislative and the executive branches evince a clear federal goal not only of promoting tribal self-government and economic security, but also of fostering the mechanisms and tribal authority necessary to achieve these goals. The power to zone and to regulate land use within a political entity's jurisdiction is one of the most fundamental and essential attributes of self-government. *See* section IV below.

Denial of tribal zoning authority over fee lands on the reservation would run totally contrary to the clear federal policy of promoting tribal self-government. That federal policy, as set forth in numerous statutes, presidential statements, and the statements of this Court, requires a finding that state, county and city land use regulatory authority over fee lands in Indian reservations is preempted and tribal authority over such lands is exclusive.

IV

TRIBAL AUTHORITY TO ZONE AND REGULATE LAND USE ON FEE LANDS WITHIN THE RESERVATION IS ESSENTIAL TO THE POLITICAL INTEGRITY, ECONOMIC SECURITY, HEALTH AND WELFARE OF THE TRIBE

The parties agree that under the holding in *Montana v. United States*, tribal authority over non-Indian conduct on fee lands within the reservation is proper insofar as that conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. Petitioners and their amici argue, however, that the Ninth Circuit gave too much sweep to that language by finding it a proper basis for Yakima tribal authority to zone fee lands within the reservation.[6] Petitioners apparently do not understand either the fundamental importance of the power to zone or the devastating impacts upon Indian tribes that would result from depriving the tribes of land use regulatory authority over fee lands sprinkled throughout their reservations.

A. Importance of Tribal Zoning

Zoning is an exercise of police power, the power of government to protect the public health, safety and welfare. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1927). The authority to plan and zone—whether exercised by a county, a municipality, or an

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[6] Petitioners argue that under *Montana*, Yakima County has authority to zone fee lands within the reservation, regardless of ownership of those lands. As respondent Yakima Nation points out, however, many of the fee lands within the reservation are owned by individual tribal members or by the tribe itself. The language in *Montana* relied upon by petitioners relates only to *non-Indian conduct* on fee lands and thus cannot provide any authority for County zoning of fee lands owned by the tribe or by tribal members. *Montana* would, at most, provide the county zoning authority over fee lands owned by non-Indians. Yet such a scheme would require that the authorities keep track of both the fee or non-fee status of parcels and the ownership of the fee parcels. As sales between Indians and non-Indians occur, parcels would oscillate from one zoning jurisdiction to another.

Indian tribe, is among the most important powers that a local governing body possesses. As Justice Marshall stated, zoning "may indeed be the most essential function performed by local governments, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1973) (Marshall, J., dissenting), quoted with approval in *Young v. American Mini Theaters*, 427 U.S. 50, 80 (1976) (Powell, J., concurring).

The power to zone is particularly important to Indian tribes because they possess unique historical, physical, and spiritual ties to their lands. *See* Comment, Jurisdiction to Zone Indian Reservations, 53 *Wash. L. Rev.* 677, 680 (1978). Justice Black discussed this historical connection in a case involving federal eminent domain over ancestral Indian land:

> It may be hard for us to understand why these Indians cling so tenaciously to their lands and traditional tribal way of life. The record does not leave the impression that the lands of their reservation are the most fertile, the landscape the most beautiful or their homes the most splendid specimens of architecture. But this is their home—their ancestral home. There, they, their children, and their forbears were born. They, too have their memories and their loves.

F.P.C. v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

Similarly, in the First Amendment context, Justice Brennan recently described the spiritual connection between Indians and the land:

> Native American faith is inextricably bound to the use of land. . . . The site specific nature of Indian religious practice derives from the Native American perception that land is itself a sacred, living being.

Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S.Ct. 1319, 1331 (1988) (Brennan, J., dissenting). For Indians, "land is not fungible." 108 S.Ct. at 1331. Tribal governments use their zoning power to nurture and protect fundamental Indian beliefs

about the appropriate uses of land. *See* Comment, Jurisdiction to Zone Indian Reservations, 53 *Wash. L. Rev.* at 680; D. Suagee, American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers, 10 *American Indian Law Review* 1, 13 (1982).

The ability to regulate reservation lands is also essential to tribal programs that promote the economic development of tribal economy. As the Ninth Circuit stated in striking down a county's attempt to enforce its zoning and building code on tribal trust lands, "tribal use and development of tribal trust property presently is one of the main vehicles for the economic self-development necessary to equal Indian participation in American life." *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 664 (9th Cir. 1975).

B. County Zoning of Fee Land Undermines and Is Inconsistent With Tribal Zoning Authority

Effective planning and zoning require the "systematic and coordinated utilization of land" in a particular area. N. Williams, *American Land Planning Law*, section 1.06 (1974). The planned pattern "must be coherent and internally consistent; that is, the various component parts must fit with each other" or "the result will be a disorganized mess of patchy development." *Id.* at section 1.07.

Petitioners in this case do not challenge tribal zoning authority over trust lands. It is clear that tribal governments have full authority to regulate land use on trust lands. *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1393 (9th Cir. 1987); *Iowa Mutual Ins. Co. v. LaPlante*, 107 S.Ct. at 975. Petitioners propose a scheme whereby tribes have full regulatory authority over trust lands in reservations but the county has authority over the fee lands within the reservation. Such a regulatory scheme would create a "crazy quilt" of checkerboard zoning throughout the reservation, with the tribal zoning applying to one set of lands and county zoning applying to the other. The checkerboard pattern is apparent in the instant case: Whiteside's property is bounded by trust land to the north, and fee land to the south, east, and west. *Yakima Indian Nation v. Whiteside*, 617 F.Supp. 750, 754 (E.D.

Wash. 1985). Other fee lands are "scattered throughout the reservation in checkerboard fashion." *Tribes and Bands of Yakima Indian Nation v. Whiteside*, 826 F.2d 529, 531 (9th Cir. 1987).

This Court has repeatedly rejected similar proposed jurisdictional divisions. *See, e.g., Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. at 478 (rejecting scheme in which state sales tax imposed on cigarette sales by Indians on fee lands but not Indian on trust lands); *Seymour v. Superintendent*, 368 U.S. at 358 (rejecting similar jurisdictional division of state and federal criminal authority).

Furthermore, different land uses are often incompatible; the very purpose of zoning is to segregate uses that are hostile to one another. *See, e.g.*, D. Mandelker, *Land Use Law*, section 1.03; *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926): "[a] nuisance may merely be the right thing in the wrong place—like a pig in a parlor instead of the barnyard." If an Indian tribe can only designate the permissible uses of non-fee lots, then it cannot ensure that uses on adjacent, nearby, or entirely encircled fee lots are compatible with the tribal zoning uses. The tribe cannot segregate incompatible conduct and activity on land; it cannot effectively zone.

For example, if the tribe designates a given trust area for agricultural use, but the county designates fee lots in that area for residential use, then the tribal scheme becomes unworkable. The use of pesticides, domestic pet interference with livestock and agricultural operations, odors emanating from a farm, and other such things make these two designations incompatible.

Similarly, if the tribe zones an area for low density residential use, but the county zones fee lots sprinkled through the area for high intensity office or industrial complexes, then the purpose and effect of the tribe's design is destroyed. *See Euclid v. Ambler Realty Co.*, 272 U.S. at 391 (noting health and safety dangers of locating office buildings in a residential district). Or, if the tribe desires a given area to remain as undisturbed as possible due to the cultural or religious significance of the area or for other reasons, then even one multi-story apartment complex on one fee

parcel, with its associated traffic, population and congestion, could destroy that scheme entirely. *See Knight v. Shoshone & Arapahoe Indian Tribes, etc.*, 670 F.2d 900 (10th Cir. 1982) (non-Indian owners of fee land proposed large residential subdivision near area where traditional tribal ceremonies held, where tribal cemeteries located, and where substantial other tribal activities took place; court enjoined work on subdivision, finding tribe, not county, had zoning authority); Jurisdiction to Zone Indian Reservations, 53 *Wash. L. Rev.* at 678 n.5.[7]

These conflicts have been live ones on the Colorado River Indian Reservation. Both Parker and CRIT assert zoning and land use regulatory authority over fee lands and Tribal trust lands within Parker. The building and zoning laws applied by Parker and CRIT are inconsistent in certain critical respects. For example, whereas the Parker Town Code severely limits construction with adobe masonry and prohibits construction of traditional tribal dwellings, the CRIT Health & Safety Code allows safe adobe construction and construction of traditional dwellings. The Parker Town Code requires payment of substantial fees before tribal members may construct owner-built structures and improvements, while the CRIT Health & Safety Code waives fees for such owner-built construction.

The conflicts between Tribal and Parker land use and zoning regulations have created problems for CRIT and its members. Serious problems have arisen in connection with at least two federally-funded housing projects initiated by the Colorado River Indian Housing Authority within Parker due to this conflict.

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[7] Of course, adjacent governments often have conflicting land use regulatory schemes. However, there are two critical differences between intra-reservation tribal/county conflicts and adjacent jurisdiction "border" conflicts. The first is that fee lots are typically sprinkled in checkerboard fashion throughout a reservation, whereas adjacent counties and cities merely share common borders. The second is that Indians and whites often hold fundamentally different views about land. The roots of these different views lie deep in the two cultures. As one author explained, the Indian view stresses human's dependence on the natural world, whereas the Christian view stresses mankind's role of exercising dominion over nature. V. Deloria, Jr., *God is Red* (1973) at 91-109, 249.

Many sites that the Housing Authority has found to be the most suitable for the planned housing, and which are available for residential use under relevant CRIT regulations, are not zoned residentially by Parker and thus have not been able to be used for Tribal housing. Application of Parker's zoning has thus resulted in use of inferior lots, delays and added costs, together with increased risks of losing the federal funding for the projects. Another result of regulation by both Parker and CRIT has been that Tribal members, most of whom have extremely limited income and assets, have been required to pay double fees and be subject to dual inspections and administrative review.

These examples demonstrate that a jurisdictional scheme permitting city or county land use regulation of fee lots on reservations would deprive Indian tribes of one of the most important aspects of the power of self-government: the power to protect the public health, safety and welfare. *See Report on Federal, State, and Tribal Jurisdiction, Final Report to the American Indian Policy Review Commission* (1976) (hereinafter "*AIPRC Jurisdiction Report*") at 119 ("Application of State or local land-use controls, directly or indirectly, have [sic] serious adverse effects on the ability of reservation Indians to formulate and implement comprehensive and beneficial development and protection of Indian resources"). Specifically, Indian tribes would effectively be denied the power to zone within their reservations. Although zoning authority would only be expressly denied for fee lands, the net result is that tribal authority to zone non-fee lands would be rendered ineffectual and unworkable due to the lack of authority over checkerboarded fee lands. Such a scheme would, therefore, severely "threaten" and have a "direct effect" on "the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566.[8]

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[8] The Court's holding in *Montana* that hunting and fishing on fee land would not imperil the tribe is inapplicable to this case. Allowing a county to regulate hunting and fishing on fee lands does not undermine or negate the power of the tribe to effectively regulate such activities elsewhere on the reservation. In contrast, zoning *by its very nature* demands uniformity and consistency for it to work at all. County/tribal regulation of hunting and fishing is feasible; county/tribal zoning is not.

Rather than eviscerate tribal authority, the Ninth Circuit adopted the course amicus CRIT urges here—recognizing the right of Indian tribes to zone all lands within the reservation.

C. The Zoning Scheme Urged By Petitioners Would Engender Other Unfair and Illogical Results

As noted by the parties and *amici*, a substantial portion of fee lands are owned by Indians or Indian tribes. Petitioners' argument that the General Allotment Act eliminated tribal jurisdiction over fee lands logically implies that counties now have jurisdiction over all fee lots—whether held by Indians or non-Indians. *See* Brief of County of Yakima at 33 (calling for "bright line" division between fee lands (state jurisdiction) and trust lands (tribal jurisdiction)).[9]

Petitioner's bright line rule would also divest tribal authority over fee lands when the county has little interest in regulating the fee lots and the tribe has great interest. For example, this jurisdictional division would strip the Yakima Indian Nation of jurisdiction over the 25,000 acres of fee lots located in the "closed area" of the reservation.

Although petitioners deride the balancing test described by the Ninth Circuit in this case, the rule they propose as an alternative is illogical and contrary to both tribal and non-Indian interests. In CRIT's view, the Ninth Circuit's test is workable; it is certainly no more difficult to apply than other balancing tests applied by the courts under First Amendment, Commerce Clause, or Equal Protection jurisprudence.[10]

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[9] This argument for exclusive county jurisdiction is flatly inconsistent with petitioners' other argument—that tribes should be stripped of zoning authority over fee lands because non-members have no political influence over tribal decisions. The "no representation/no regulation" argument would seem to concede that tribes should at least exercise jurisdiction over fee lots owned by tribal members.

[10] Given the complexities of the jurisdictional conflicts on Indian reservations, neither Indian tribes nor cities, counties or states can expect the Court's decision in this or other cases to bring a final resolution to all of these jurisdiction-related problems. Ultimately,

The Ninth Circuit has correctly held that as a general rule, tribes have the authority to zone fee lands under the second exception of *Montana*. That presumption may, however, be overcome under certain limited circumstances where tribal interests are obviously *de minimis*, such as where a tribe has explicitly renounced any regulatory interest in the fee lands. Such a rule is consistent with *Montana*, with other decisions by this Court, and with congressional enactments on the subject.

V

IF REMEDIES FOR ALLEGED VIOLATIONS OF CIVIL RIGHTS OF NON-INDIANS ON FEE LANDS IN INDIAN RESERVATIONS ARE INADEQUATE, THE PROPER SOLUTION IS CONGRESSIONAL ACTION, NOT JUDICIAL REVAMPING OF THE FUNDAMENTAL PRECEPTS OF INDIAN LAW

A recurrent theme raised by petitioners and their amici, echoing arguments that have been repeated time and again over the years in relation to non-Indians on Indian reservations, is that Indian tribes can have no authority over non-Indians because

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effective solutions which take into account the unique facts of each situation can only be found with the diligent efforts of each of the governmental entities involved and of their constituents. One such solution which CRIT and others have found effective and workable is that of intergovernmental agreements.

CRIT has entered into intergovernmental agreements with the Town of Parker for sewage disposal and fire protection and is negotiating fire protection agreements with Riverside and San Bernardino Counties. CRIT also has an intergovernmental agreement with La Paz County for solid waste disposal as well as various intergovernmental agreements with the State of Arizona for the administration of education, social welfare and vocational programs. While the legal authority for each type of agreement must be addressed on a case by case basis, tribes and local governments have entered into such agreements in areas ranging from law enforcement to child welfare. *See Federal Indian Law* at 380-81. In those situations where full implementation of an intergovernmental agreement requires a specific grant of jurisdictional authority, the agreement can be submitted to Congress for ratification.

non-Indians have no voice in tribal government. In addition, non-Indians argue, there is limited judicial recourse available to them for alleged civil rights violations because under the doctrine of tribal sovereign immunity they may file legal proceedings against a tribe only where the tribe has expressly consented to suit. *See e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The same argument has been made to this Court in virtually every case involving exercise of tribal authority over non-Indians. *See, e.g., National Farmers Union Ins. Co. v. Crow Tribe*, 105 S.Ct. 7 (1985) (Rehnquist, J., granting stay); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 183 (Stevens, J., dissenting opinion); *United States v. Mazurie*, 419 U.S. 544, 557-58 (1975). *See also AIPRC Jurisdiction Report* at 96-98 (1976).

This Court in *United States v. Mazurie*, 419 U.S. at 557-58, quoting *Williams v. Lee*, 358 U.S. at 223, answered the point definitively:

> It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-566, 23 S.Ct. 216, 220-221, 47 L.Ed. 299.

Precisely the same point was made by the American Indian Policy Review Commission which reviewed the issue of exercise of tribal jurisdiction over non-Indians on reservations. The Commission concluded:

> non-Indians which make up the vast majority of nonmembers on reservations, are the beneficiaries of the policies passed by Congress which placed such lands in their hands. Any notion that Indian people received adequate compensation for those lands does not require refutation here. If nonmembers are in a position of loss of property without due process of law, then they must look at the body which occasioned that loss—the United States Congress.

> Remedies available to nonmember fee patent owners should not come at the expense of tribal entities which were subjected to such policies without their consent and, often, over their objections. Such limitations may have the effect of stifling the very forward movements so long promised and so long sought after by Indian people and tribal governments.

AIPRC Jurisdiction Report at 118. Addressing the issues raised in this case, the Commission recommended that tribal regulation of land use within reservation boundaries should preempt any State or local control over both trust and fee patent lands where such tribal regulation is in furtherance of a scheme to develop or protect reservation land or resources. *AIPRC Jurisdiction Report* at 119.

The issue of the conflicts between the expectations of Indian tribes and those of non-Indian settlers is described at length in the recent book *American Indians, Time, and the Law* (1987), by Indian law scholar Charles Wilkinson, at 22-23, 111-119. Like this Court in *United States v. Mazurie*, 419 U.S. at 557-58 and *Williams v. Lee*, 358 U.S. at 223, and like the American Indian Policy Review Commission, Wilkinson concludes that it is up to Congress, not the courts to address the concerns raised by non-Indians on reservations:

> The settled principles of preconstitutional and extraconstitutional tribal status, coupled with the promise of a viable, evolving separatism in the treaties and treaty substitutes, justify race-based tribal governments without political representation by nonmembers. The courts should respect these precepts and provide latitude to tribes by generously construing tribal powers over nonmembers. Congress, not the courts, should make alterations based on expediency.
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> * * *
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> A continuing theme of the modern opinions is for the Court to affirm the existence of Indian rights, with the caveat that Congress can make adjustments pursuant to its power over Indian affairs.
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> [J]udicial opinions in Indian law usually involve just one tribe but apply generically to all tribes. Thus if a court is

> influenced by an individual flagrant abuse and departs from principle to deny tribal powers, the rights of all tribes are implicated. . . Whether abuses exist and, if they do, whether they are sufficiently serious to warrant curtailing tribal powers are matters that Congress is best equipped to resolve. A legislature is not bound by the facts of just one case. Congress has investigative and oversight powers designed to produce a comprehensive record. Institutionally, the courts are best suited to the judiciary's traditional role of holding firmly to historic principles that are protective of tribal prerogatives.

American Indians, Time, and the Law, at 117-18.

As Wilkinson also points out, non-Indians on reservations are not totally without recourse as petitioners and their amici imply. *Id.* at 114. Where, for example, tribal officials are acting outside the scope of their official authority, judicial relief may be available. *See, e.g., Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 170-71 (1977). Also, non-Indians may pursue offsetting claims when they are sued by Indian tribes. *See California State Board of Equalization v. Chemehuevi Indian Tribe*, 106 S.Ct. 289 (1985). In addition, this Court's decision in *National Farmers Union Ins. Co. v. Crow Tribe* permits a non-Indian, after exhausting tribal court remedies, to obtain a federal court determination of whether the tribe has jurisdiction.

Finally, various amici claim that Indian tribes are more likely to abuse their zoning power than are cities and counties, as a result of tribes' desires to promote tribal enterprises. The potential for such abuses is, however, no greater with respect to Indian tribes than it is for cities and counties. More and more, cities and counties also are owners of some of the lands which they regulate. Like tribes, cities and counties promote projects on their lands to provide much-needed income. Insofar as there is a risk that a zoning authority will favor its own lands, the risk exists for all governmental entities that both zone and own land within their jurisdiction.

CONCLUSION

The language in *Montana v. United States*, 450 U.S. 544 (1981) concerning tribal powers over non-Indians on fee lands in a reservation can best be understood in light of this Court's prior holdings concerning tribal sovereign powers and limited state jurisdiction on reservations. A review of the applicable case law, as well as all pertinent congressional enactments relating to fee lands on reservations demonstrates that the *Montana* language cannot be given the constricted interpretation urged by petitioners. To the contrary, the instant case presents a perfect example of the type of case that falls squarely within reach of the *Montana* language, as zoning of fee lands on the Yakima Reservation clearly "threatens or has some direct effect on the political integrity, economic secuirty, or the health and welfare of the tribe." 450 U.S. at 566.

As described above, the right to zone *all* lands within an Indian reservation, both fee lands and trust lands, is critical to Indian tribes' right of self-governance. Unlike the hunting and fishing rights at issue in *Montana*, it is impossible and improper to attempt to place zoning authority over fee lands with one governmental entity and zoning authority over non-fee lands with another. Insofar as non-Indians residing or owning fee lands on Indian reservations have legitimate complaints of violations of their rights for which they can find no remedy, it is up to Congress, not this Court, to solve that problem.

For all the reasons stated herein, amicus curiae Colorado River Indian Tribes urges the Court to affirm the decision of the Ninth Circuit in this case.

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Respectfully submitted,

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